Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH; ELISE MARIE WEISSICH HUDSON; and WILLIAM O. WEISSICH, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Does the government's failure to warn an individual of a foreseeable danger of murder by federal probationer sufficiently implicate policy concerns so as to fall into the "discretionary function" exception of the Federal Tort Claims Act?

2. Do United States Probation Service ("USPS") guidelines requiring that reasonably foreseeable victims be warned of threats make such warnings a discretionary function when the identical test of "reasonable foreseeability" is imposed on all citizens under state law?

PARTIES

The parties filing this petition are plaintiffs and appellants, Rosemary Weissich, Jill Elaine Weissich, Elise Marie Weissich Hudson and William O. Weissich, Jr. ("the Weissichs"), who are the survivors of a former District Attorney of Marin County, California, William O. Weissich.

The respondent, defendant and appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

I.

LOWER COURT OPINIONS.

The opinion of the United States Court of Appeals for the Ninth Circuit is recorded in *Weissich v. United States*, 4 F.3d 810 (9th Cir. 1993). *See* Appendix, p. A-3.

II.

GROUNDS FOR JURISDICTION OF THE SUPREME COURT.

The Court of Appeals issued its opinion in this case on September 10, 1993. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied on November 4, 1993.

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE.

1. *Federal Tort Claims Act*, 28 U.S.C. § 2674.

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

2. *Discretionary Function Exception to Federal Tort Claims Act*, 28 U.S.C. § 2680(a).

> "The provisions of this chapter . . . shall not apply to —
>
> > any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."

IV.

STATEMENT OF THE CASE.

A. Factual Background.[1]

1. *Overview.*

The late William O. Weissich was the elected District Attorney of Marin county, California, located in the San

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[1]The following factual recitation is drawn from the Ninth Circuit's opinion (see Appendix, p. A-3), the factual portions of the trial court's order granting summary judgment (see Appendix, p. A-13) and official

Francisco Bay Area. Mr. Weissich was brutally slain in 1986 by a federal probationer. His assailant, an ex-convict who had been prosecuted by Mr. Weissich, was arrested in 1983 by the Bureau of Alcohol, Tobacco and Firearms ("ATF") as a felon in possession of firearms. Some years earlier, this individual had threatened to kill Mr. Weissich and others connected with his prosecution. This fact was generally known to all concerned at the time of, or shortly after, the 1983 federal arrest. Despite this intelligence, both ATF and the U.S. Probation Service neglected, failed and refused to warn Mr. Weissich of impending danger.

2. *The Perpetrator's Criminal History.*

In 1955, the Marin County District Attorney, William Weissich ("Weissich"), prosecuted Malcolm Schlette ("Schlette"). 9th Cir. Opn., p. A-6. Schlette was convicted of arson and sentenced to twenty years in prison. *Id.* He threatened to retaliate by killing Weissich, the judge, the jurors, the witnesses and the police officers involved in his conviction. *Id.*

In 1966, Schlette was released on state parole. *Id.* Authorities discovered that he planned to carry out his prior threats and returned him to prison to serve the remainder of his twenty year term. *Id.* In 1975 Schlette completed his term and was released without supervision. *Id.*

3. *The Federal Investigation and Prosecution of Schlette.*

In 1983 "particular plans" by Schlette for revenge against Weissich and others prompted Schlette's arrest. Trial Ct. Opn., p. A-15. There is no contention that Weissich ever learned of these particular plans. *Id.*

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documents included in the Excerpts of Record filed by the Weissichs in the Ninth Circuit. These sources shall respectively be referred to as "9th Cir. Opn.," "Trial Ct. Opn." and "ER."

Schlette was arrested by Joseph M. Stafford ("Stafford"), a Special Agent of the ATF. Stafford's report indicates that federal authorities had full knowledge of Schlette's history, including his efforts to obtain weapons after his 1966 release and death threats against those involved in his prosecution. ER 59. Stafford refers to information that **Schlette "told an inmate confidente [sic] that once released he was going to obtain weapons, become proficient in their use, and then carry out his assassination plans."** *Id.* (Emphasis added.) Stafford's report also states that federal agents knew that Schlette was in possession of "confidential home addresses and phone numbers of public officials and witnesses involved in his case" and that Schlette had "reiterated to CDC [California Department of Corrections] officials those persons who he visualized as having lied and conspired to get and keep him in prison — **the D.A.**, his wife, and public officials." ER 59. (Emphasis added.)

ATF learned in early 1983 that in July or August of 1982 Schlette had entered a gun shop in Santa Rosa, California for modification on the rear sight of a rifle. Schlette subsequently returned to purchase "aim-point sighting devices" for that rifle plus a .45 caliber pistol. *Id.* at 60. On January 27, 1983, a raiding party consisting of five ATF agents and two officers from the Sonoma County Sheriff's Office set out to arrest Schlette. *Id.* at 61. Schlette was lured to a local Sheriff's office substation and arrested in the parking lot. *Id.* at 62. A search of Schlette's residence located the rifle, two boxes of ammunition, three "tasers" and other evidence. *Id.* The .45 pistol had been left at the gun shop for modification. *Id.* at 60.

Schlette subsequently pled guilty to a charge of being a felon in possession of firearms and was placed on supervised federal probation for five years. 9th Cir. Opn., p. A-6.

Stafford testified at his deposition that he knew there was a risk to individuals previously threatened by Schlette as a result of his being placed on probation. ER 106.

A report by U.S. Probation Officer Oliver J. Deegan, dated November 22, 1985 noted:

> "Mr. Schlette has a very checkered history and a review of the file is recommended. You will note that his case arises out of the 1955 conviction in Marin County for arson and there were subsequent fears by authorities that Mr. Schlette had targeted participants in his conviction for some kind of harm.... Mr. Schlette had been taking care of his elderly mother, but he reported she died in August 1984 at the age of 94. Now that the mother has died, there should be some more concern about the structure of his life." ER 155.

Officer Deegan noted further that "it might be a good idea to advise the Santa Rosa Police Department of his presence in the area, in view of the nature of this man's prior history.... Consideration should be given to any propensity for arson *or vengeance*, in view of his prior history." (Emphasis added.) ER 155.

4. *Schlette Murders Weissich.*

In 1986, still on federal probation, Schlette travelled to William Weissich's law office, located in San Rafael, California, approximately 35 miles from Schlette's home in Santa Rosa.[2] There, Schlette killed Weissich by shooting him in the head and chest with a .45 caliber handgun equipped with a silencer and laser sighting device. Mr. Weissich had been given no information about or

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[2]The Marin County Superior Court, where Weissich prosecuted Schlette, is also located in San Rafael.

warning of Schlette's 1983 federal arrest, conviction and subsequent probation for possession of firearms. ER 4-5, 40.

Schlette fled the murder scene in a van. When stopped by officers from the San Rafael Police Department, he committed suicide by ingesting poison. *Id.*

B. Procedural History.

The instant Federal Tort Claims Act ("FTCA") action was brought by the wife and three children of William O. Weissich. The action alleged that the ATF and the USPS negligently failed to warn Weissich of the known present threat to his life posed by Schlette and that the USPS negligently supervised Schlette's probation. Federal jurisdiction was based on 28 U.S.C. § 1346(b). ER 3.

California law provides that *there is a duty to warn a potential victim of violent acts by a third party* where there is a "special relationship." *See, e.g., Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 435 (1976); Trial Ct. Opn., A-15. The trial court assumed there was a special relationship between the United States and Schlette after his 1983 arrest. *Id.* It found that was "unclear" if the discretionary function exception to the Federal Tort Claims Act applied and therefore assumed it did not apply. *Id.* at A-14. Nonetheless, the trial court granted the government's motion for summary judgment and dismissed the entire action. *Id.* at A-17.

The Ninth Circuit affirmed. The Court of Appeals' opinion in *Weissich v. United States* is based solely "on the ground that the discretionary function exception of the . . . FTCA bars the Weissichs' suit against the United States." *Id.* at A-6.

V.

ARGUMENT.

A. The Ninth Circuit Improperly Held That The Decision Whether To Warn A Foreseeable Victim Of Violence Implicated Policy Concerns And Hence Fell Within The Discretionary Function Exception To The Federal Tort Claims Act.

The primary goal of the FTCA is to allow tort liability to be asserted against federal actors and agencies on the same basis that it may be asserted against private parties under the common law of the jurisdiction in question. *See, e.g., Richards v. West*, 369 U.S. 1, 6-7 (1962). This is clearly stated at 28 U.S.C. § 2674 which provides:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

There are several statutory exceptions to the Federal Tort Claims Act. The Ninth Circuit found that the discretionary function exception applied in the instant case. This exception provides:

> "The provisions of this chapter . . . shall not apply to . . . any claim . . . based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

This Court has summarized the framework for analyzing the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531 (1988). In *Berkovitz*, this Court held that "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes the course of action for an employee to follow."

Id. at 536. The *Berkovitz* Court also held that, in those instances where a federal statute, regulation or policy does *not* prescribe a course of action, and hence the challenged conduct involved an element of judgment, nonetheless "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* The Court went on to hold that in those situations in which the challenged conduct involves an element of judgment, the exception

> "protects only governmental actions and decisions based on considerations of public policy. . . . The discretionary function exception insulates the government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537, 539.

Thus, outside of the narrow range of cases where a federal statute, regulation or policy specifically prescribes a course of action the breadth of the discretionary function exception depends on the federal courts' interpretation of "the permissible exercise of policy judgment." An overbroad reading of this language can eviscerate the Federal Tort Claims Act. That is precisely what the Ninth Circuit has done in the instant case.

The Ninth Circuit flatly holds that any decision that concerns warning a victim of potential violence would inherently involve the exercise of policy judgment. The Court of Appeals' analysis is as follows:

> "Here, the Weissichs have identified no federal statute, regulation of policy mandating that ATF officers warn a potential victim. . . . We conclude that the decision whether to warn William Weissich was a matter of discretionary choice for the agency.
>
> "This choice implicated policy concerns. These concerns include how much of the agency's resources it

should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

"It is not necessary for the government to prove a conscious decision based on a policy analysis. . . . It is enough that the choice is one to which a policy analysis may apply. . . . Here, it is. Accordingly, the ATF is shielded by the discretionary function exception of the FTCA from any negligence in failing to warn William Weissich of the danger Schlette posed to him." *Id.* at A-7-8.

This analysis is broad enough to apply to any situation in which a federal agency learns of a foreseeable risk of harm.[3] Indeed, the Ninth Circuit's opinion did not analyze the detailed facts of the case, since they were irrelevant given

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[3]Prior to this Court's decision in *United States v. Varig Airlines*, 467 U.S. 797 (1984), the Ninth Circuit had permitted federal liability for failure to warn. *See United States v. White*, 211 F.2d 79, 82 (9th Cir. 1954). However, in *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985), the court, citing *Varig*, abandoned its earlier use of the planning level/operational level dichotomy for analyzing the discretionary function exception. *Id.*, 768 F.2d at 1062-1063, n.2. The effect on the duty to warn question was immediate — the *Begay* court held the failure of the U.S. Public Health Service to warn uranium miners of the increasing evidence of radiation danger was a discretionary function. *Id.* at 1065-1066. *See also In Re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir., 1987) (decision whether to warn participants in atmospheric nuclear weapons tests was discretionary function). *But Cf. Summers v. United States*, 905 F.2d 1212, 1215-1216 (9th Cir. 1990). The rationale of *Summers*, which found that there was no evidence that competing policy considerations were reviewed was rejected *sub silentio* by the portion of the *Weissich* opinion holding that the government need not prove "a conscious decision based on policy analysis." *Id.* at A-8.

the court's broad interpretation of the discretionary function exception.

The Court of Appeals' decision in *Weissich* departs from the analysis of several other circuits. In *Smith v. United States,* 546 F.2d 872 (10th Cir. 1976) the court rejects a similar argument by the government that a decision whether to place warning signs at a dangerous geothermal location in Yellowstone National Park was a discretionary function. The Tenth Circuit found that the decision to designate the location as "undeveloped" was discretionary, but that the duty to warn of danger was not:

> "A policy decision to designate certain areas as 'undeveloped' ones may reasonably entail the omission of boardwalks, trails or footpaths and signs marking such ways. However, it does not follow that the government, as a landowner, is absolved of all duty under state law to erect safety devices or signs cautioning about conditions which have been left undisturbed as a policy matter. . . . If we were to accept the government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them. . . . Similar decisions to omit warnings or dangerous or hazardous conditions have been held not to come within the exception for discretionary functions. . . . We are convinced that the government's decision, as a landowner, not to warn of the known dangers or to provide safeguards cannot rationally be deemed the exercise of a discretionary function." *Id* . at 877.

In *Dube v. Pittsburgh-Corning,* 870 F.2d 790 (1st Cir. 1989), the court found that the failure to warn "domestic bystanders," i.e., family members, of the danger of exposure to asbestos on the work clothes of employees of a naval shipyard was not protected by the discretionary function exception. The First Circuit based its decision, in part, on

the fact that the government made no policy judgment not to warn the bystanders. It simply failed to warn them. *Id.* at 797. The court also notes, however, that:

> "[B]eyond the lack of a Navy policy judgment, the nature of a putative policy not to warn domestic bystanders is highly speculative. We do not need to enter the policymaking arena to observe that it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or policy grounds." *Id.* at 800.

The *Weissich* decision conflicts with *Dube*'s holding on the importance of the alleged burden on the agency providing warnings. In *Dube*, the court noted it was "difficult to imagine" justifying a decision not to warn based on economic or other policy grounds. *Id.* at 800. By contrast, in *Weissich*, the court noted that, "an analysis of these factors would likely include consideration of budgetary constraints as well as time and personnel limitations." *Id.* at A-8.

The government may argue that the duty to warn Mr. Weissich of the danger of violence by Mr. Schlette is distinguishable from the duty to warn of geological hazards and asbestos recognized respectively in *Smith*, supra, and *Dube*, supra. This argument does not withstand scrutiny. There was a "special relationship" between Schlette and the federal government. The government knew that Schlette was dangerous and that Weissich was a foreseeable target of attack. In addition, as a result of its 1983 investigation of Schlette, the government knew specific information about the whereabouts of Schlette and his continuing efforts to illegally obtain firearms that could have alerted Weissich to the continuing danger.

Moreover, the Ninth Circuit's opinion makes no fine distinctions. The Ninth Circuit did not find it necessary to

scrutinize the record to determine what the government learned, when it learned it, how difficult it would have been to locate Weissich,[4] or to analyze in detail any policy considerations that might militate against warning him. The court held as a matter of law that budgetary and personnel limitations were involved and that, therefore, the decision whether or not to warn was discretionary. That is an assumption that is unsupported and unsupportable. Obviously, such budgetary and personnel constraints exist in any situation in which the common law imposes a duty to warn.

In *Indian Towing v. United States*, 350 U.S. 61 (1955), this Court held that, while the government did not have an obligation to build a lighthouse, once it had done so, it was subject to tort liability for failing to maintain the lighthouse in working order. The distinction drawn in *Indian Towing* between the discretionary decision whether to undertake an activity and the non-discretionary duty to do so in a non-negligent manner was recognized in *United States v. Gaubert*, 499 U.S. 316, 326 (1991), and *Berkovitz*, supra, 486 U.S. at 538, n.3. The analogy fits here as well. The federal government was under no obligation to investigate, arrest or prosecute Schlette. Having done so, however, it cannot characterize as a "policy decision" its duty under California law to warn Weissich about a foreseeable risk of danger of which the government learned through its investigation of Schlette.

To summarize, the Ninth Circuit's decision effectively eliminates affirmative duties to warn from the FTCA, or at least eliminates such duties arising out of reasonably foreseeable threats of harm from third parties such as Mr. Schlette. Viewed either way, the Ninth Circuit's decision is inconsistent with the law of other circuits and constitutes an

---

[4]Weissich was murdered in his law office in San Rafael, the same small city where he prosecuted Schlette.

unwarranted expansion of the discretionary function exception so as to swallow the rule. Accordingly, the Court should grant certiorari to review this decision.

B. The Ninth Circuit Erred in Holding That Federal Guidelines Requiring Victims to Be Warned Where There Is a "Reasonably Foreseeable" Danger Involved a Discretionary Function.

The Ninth Circuit's opinion treats the liability of the USPS separately from the liability of the ATF. It notes that USPS guidelines imposed a duty on probation officers to warn potential victims of a "reasonably foreseeable" risk. The Court of Appeals holds that "the determination whether a reasonably foreseeable risk exists depends upon a select case-by-case evaluation. A case-by-case evaluation presumes significant officer discretion." *Id.* at A-10. The Ninth Circuit panel then concludes that the determination whether a particular risk was reasonably foreseeable was discretionary. *Id.* at A-11.

The fundamental error in the court's analysis is that foreseeability is a critical element in determining whether there is a duty to warn for *any* party under California law. *See, e.g., Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 439 (1976). *Cf.* California Government Code Section 835 (imposing liability on public entities where, *inter alia*, danger is "reasonably foreseeable"); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 923 (1980) (negligent party liable to reasonably foreseeable victim of erroneous diagnosis of syphilis); *Dillon v. Legg*, 68 Cal.2d 728, 739 (1968) (general principle of California tort law allowing recovery to those whose injury was reasonably foreseeable). In other words, the law of California imposes on *all* parties, federal and otherwise, a duty to warn where the risk is reasonably foreseeable. The panel's holding converts a mandatory duty into a "discretionary" function solely because the federal guidelines incorporate the common law

standard. This cannot be correct — the net result is that the guidelines, while purporting to adopt principles of common law, actually eviscerate an entire class of tort duties.

Here again, the Ninth Circuit panel allows the tail to wag the dog — it allows an overbroad interpretation of the discretionary function exception to dominate its analysis. By ruling that the decision whether a particular threat is "reasonably foreseeable" is a discretionary function, the Court of Appeals ignores the substantial body of tort law that fixes liability on private parties by the exactly same standard.

C. This Court Should Grant Certiorari in Order to Resolve the Conflict in the Circuits and to Prevent the Ninth Circuit from Eviscerating the Federal Tort Claims Act.

As argued in Section V.A. of this petition, supra, the Ninth Circuit's holding that the decision whether to warn a victim of a foreseeable risk of harm is a discretionary function is in direct conflict with the holdings of other circuits in analogous circumstances. This alone is a sufficient ground for granting certiorari pursuant to Rule 10.1(a) of the Rules of the Supreme Court.

Just as important, the Ninth Circuit's decision effectively nullifies a class of tort duties. As noted in *Allen v. United States*, 527 F.Supp. 476, 479 (D. Utah 1981): "Of the exceptions to the Government's waiver of sovereign immunity under the Federal Tort Claims Act, the discretionary function exception has by far the greatest potential for repeated and varied application. . . . **Read broadly, the discretionary function exception may easily swallow the rule.** . . ." (Emphasis added.) Petitioners submit that that is precisely what will happen if the Ninth Circuit decision remains in force.

Moreover, there is clearly a need for guidance to the lower courts on the application of the discretionary function ex-

ception to situations where tort law imposes an affirmative duty to warn. As noted in *Dube v. Pittsburgh-Corning*, supra: "Rather than a seamless web, however, we found the law in this area to be a patchwork quilt." *Id.*, 870 F.2d at 796. By granting the instant petition, the Court can resolve these uncertainties and assure that the Federal Tort Claims Act is interpreted in a manner that fully recompenses victims of negligence while still protecting the legitimate exercise of policymaking discretion.

VI.

CONCLUSION.

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: February 2, 1994

Respectfully submitted,

GOLDSTEIN & PHILLIPS
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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH; ELISE MARIE WEISSICH HUDSON; and WILLIAM O. WEISSICH, JR.,

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APPENDIX

1. Ninth Circuit's Order of November 4, 1993, denying petition for rehearing
2. Ninth Circuit's Opinion in Weissich v. United States of America, 4 F.3d 810 (9th Cir. 1993)
3. District Court's Order of February 3, 1992, denying motions to dismiss and granting summary judgment

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARY WEISSICH, JILL ELAINE WEISSICH, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendant-Appellee.

No. 92-15411
D.C. No. CV-88-3853 RHS
ORDER

Before: KOZINSKI, THOMPSON and T.G. NELSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARY WEISSICH, JILL ELAINE WEISSICH, et al.
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Defendant-Appellee.

No. 92-15411
D.C. No.
CV-88-03583-RHS
OPINION

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued and Submitted
August 10, 1993—San Francisco, California

Field September 10, 1993

Before: Alex Kozinski, David R. Thompson and
T.G. Nelson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Civil Litigation and Procedure/Immunity

The court of appeals affirmed a judgment of the district court. The court held that the discretionary function exception of the Federal Tort Claims Act barred a suit for negligent failure to supervise a federal probationer and to

warn a person of an impending threat posed by the probationer.

William Weissich was the district attorney who prosecuted Malcolm Schlette for arson in 1955. Schlette was convicted and sentenced to twenty years in state prison. Schlette threatened to kill Weissich and the judge, the jurors, witnesses, and police officers involved in his conviction. He was paroled in 1966, but reincarcerated for the duration of his term when it was discovered that he still planned to cary out his prior threats. He was released without supervision in 1975.

In 1983, Schlette was arrested by the Bureau of Alcohol, Tobacco and Firearms, pleaded guilty to being a felon in possession of a firearm, and was placed on five years probation. In 1986 he shot and killed Weissich. Appellant Rosemary Weissich and her children sued, alleging that ATF and the United States Probation Service negligently failed to warn Weissich of an impending threat from Schlette, and that USPS had negligently supervised him. The district court granted summary judgment for the government and the Weissichs appealed.

[1] There was no federal statute, regulation, or policy mandating that the ATF warn Weissich and the decision whether to do so was a matter of discretionary choice [2] to which a policy analysis involving the allocation of agency resources [3] might apply. Thus, the ATF was shielded from suit.

[4] Likewise, the administrative guidelines pursuant to which USPS might have warned Weissich inherently required the exercise of discretion by officers in balancing the dual obligations to protect the public and to promote the rehabilitation of probationers. [5] Further, the language of the guidelines was suggestive rather than mandatory and a warning was required only when a reasonably foreseeable

risk of harm to a specific third party was believed to exist. [6] Thus, USPS was shielded from the Weissichs' count for failure to warn.

[7] With respect to supervision, federal probation release conditions by their terms implicated discretionary choices by probation officers regarding when and how probationers would be required to report and the grounding of such choices in policy must be presumed. [8] Finally, the establishment of a supervisory plan consistent with the obligations imposed by the USPS guidelines involved policy decisions regarding public safety, allocation of resources, and the likelihood of rehabilitation. [9] Thus, USPS was shielded from the Weissichs' count for negligent supervision.

COUNSEL

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Stephen L. Schirle, Assistant United States Attorney, San Francisco, California for the defendant-appellee.

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

In their complaint filed in the district court, Rosemary Weissich and her three children ("the Weissichs") asserted two claims against the United States. First, they alleged that the Bureau of Alcohol, Tobacco and Firearms ("ATF") and the United States Probation Service ("USPS") negligently failed to warn William Weissich of an impending threat posed by Malcolm Schlette, a federal probationer. Second, they alleged that the USPS negligently supervised Schlette. The district court granted summary judgment in favor of the government on both claims and dismissed the action. The

Weissichs appealed. We affirm. We do so, however, on the ground that the discretionary function exception of the Federal Tort Claims Act ("FTCA") bars the Weissichs' suit against the United States.

FACTS

In 1955, the Marin County District Attorney, William Weissich, prosecuted Malcolm Schlette. Schlette was convicted of arson and sentenced to twenty years in prison. He threatened to retaliate by killing the district attorney, the judge, the jurors, all witnesses, and the police officers involved in his conviction. In 1966, Schlette was released on state parole. Authorities discovered that he planned to carry out his prior threats and returned him to prison to serve the remainder of his twenty-year term. In 1975, Schlette completed his full term and was released without supervision.

In 1983, he was arrested by the ATF. He pleaded guilty to being a felon in possession of firearms and was placed on federal probation for five years. In 1986, while on probation, Schlette shot and killed William Weissich.

DISCUSSION

We review a grant of summary judgment de novo. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir. 1987). We may affirm a summary judgment on any ground supported by the record. *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957). A district court's determination of subject matter jurisdiction under the discretionary function exception of the FTCA is reviewed de novo. *Mitchell v. United States,* 787 F.2d 466, 468 (9th Cir. 1986) *cert. denied*, 484 U.S. 856 (1987).

The FTCA authorizes suits against the United States for negligent performance of governmental functions. 28 U.S.C. § 1346(b) (1988). The Act, however, is subject to

certain exceptions. One exception is the discretionary function exception set forth in section 2680(a).

> The provisions of this chapter shall not apply to any claim based on an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise of performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

To determine whether the discretionary function exception applies, we look to the nature of the alleged negligent conduct. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). All decisions implementing a discretionary decision are not necessarily protected, but only those choices grounded in social, economic and political policy. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988).

[1] The discretionary function exception does not apply when a federal statute, regulation or policy specifically prescribes a course of action for a government employee to follow. *United States v. Gaubert*, 111 S.Ct. 1267, 1277 (1991). In *Gaubert*, the Court concluded that certain agency action was discretionary because there were no formal regulations governing the conduct in question. Here, the Weissichs have identified no federal statute, regulation or policy mandating that ATF officers warn potential victims. Consistent with the analysis in *Gaubert*, we conclude that the decision whether to warn William Weissich was a matter of discretionary choice for the agency.

[2] This choice implicated policy concerns. These concerns include how much of the agency's resources it should

commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

[3] It is not necessary for the government to prove a conscious decision based on a policy analysis. *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989). It is enough that the choice is one to which a policy analysis may apply. *Id.* Here, it is. Accordingly, the ATF is shielded by the discretionary function exception of the FTCA from any negligence in failing to warn William Weissich of the danger Schlette posed to him. *See Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986), *cert. denied*, 484 U.S. 856 (1987) (The FTCA exempts discretionary functions "whether or not the discretion involved be abused.").

The Weissichs contend that the failure to warn was not a matter of choice for the probation officers. They contend that the USPS guidelines impose a mandatory duty on probation officers to warn a foreseeable victim of a risk of harm imposed by probationers. The guidelines provide:

> Probation officers have an obligation to protect the public as well as promote the rehabilitation of the probationer. In meeting these dual obligations, the probation officer has a duty to warn *specific* third parties of a *particular* prospect of harm, *physical* or *financial*, which the officer "reasonably foresees" the probationer may pose to them. The obligation exists whether or not the third party has solicited the information.
>
> (1) The circumstances of all persons under probation supervision should be reviewed periodically to determine whether they might pose a reasonably *foreseeable* danger to a third person. The guidelines apply

to probationers who already have secured employment as well as ones presently seeking employment.

(2) The guidelines are *selective*. A warning is not required in every case, *only* where a *reasonably foreseeable* risk of harm to a *specific* third party is believed to exist.

Determination of Risk. The determination of whether a "reasonably foreseeable" risk exists depends upon a selective case-by-case evaluation. The evaluation should be based upon, among other factors, (1) the probationer's job; (2) his or her prior criminal background and conduct; and (3) the type of crime for which he was convicted. Special attention should be paid to employment or other circumstances which present the probationer with an opportunity or temptation to engage in criminal or antisocial behavior related to his criminal background.

Reasonably Foreseeable Risk. "Reasonably foreseeable" means that the circumstances of the relationship between the probationer and the third party, *e.g.*, employer and employee, suggest that the probationer may engage in a criminal or antisocial manner *similar* or *related* to his past conduct.

Decision Regarding Disclosure.

(1) If the probation officer determines that *no* reasonably foreseeable risk exists, then *no* warning should be given.

(2) If the probation officer determines that a *reasonably foreseeable risk* exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation, whether to: (a) give no warning, but increase the probationer's supervision sufficiently to minimize the risk;

> (b) give no warning, but preclude the probationer from employment; or (c) give a confidential warning to the specific third party sufficient to put the party on notice of the risk imposed.

Guide to Judiciary Policies and Procedures Probation Manual, Vol. X Chapter 4 § 4302 (1983).

[4] If a policy allows room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. *Berkovitz*, 486 U.S.S. at 546. The probation guidelines require officials to make independent policy judgments. The guidelines set out dual obligations of a probation officer to (1) protect the public, and (2) promote the rehabilitation of the probationer. Because these interests may conflict, officer discretion in balancing them is inherent.

[5] The guidelines provide that the circumstances of probationers "should" be reviewed periodically to determine if they pose a reasonably foreseeable danger to a third person. This language is suggestive, not mandatory. It serves as a general guideline to probation officers. The guidelines also provide that they are "selective." A warning is not required in every case, only where a reasonably foreseeable risk of harm to a specific third party is believed to exist.

The guidelines clearly leave it to the officers' discretion to determine what is a reasonably foreseeable risk of harm to a specific third party. The determination whether a reasonably foreseeable risk exists depends upon a selective case-by-case evaluation. A "case-by-case" evaluation presumes significant officer discretion. The guidelines list several policy factors an officer should consider in determining the risk posed by a probationer and whether a warning is necessary.

[6] We conclude that the USPS, like the ATF, is protected by the discretionary function exception of the FTCA from liability for not warning Weissich about Schlette.

The Weissichs also contend that the USPS negligently supervised Schlette by failing to carry out it's own plan of supervision and failing to enforce the terms of Schlette's probation.

[7] Release conditions for a probationer are set forth in 28 C.F.R. § 2.40 (1992). This section specifically provides that the probationer shall report to his probation officer as the probation officer directs. Thus, when and how a probationer will report implicates a discretionary choice by the probation officer. When a statute, regulation or agency guideline allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. *Gaubert*, 111 S.Ct. at 1277.

[8] In addition, according to USPS guidelines, a probation officer has dual obligations to (1) protect the public, and (2) promote the rehabilitation of the probationer.[5] To meet these dual obligations, a probation officer must establish a supervisory plan which both promotes the rehabilitation of the probationer and causes the least possible harm to the public. This balancing of interests necessarily involves policy decisions on matters such as public safety, allocation of scarce resources, and the likelihood of rehabilitation.

[9] Schlette's probation officers made discretionary choices pertaining to his supervision while he was on federal probation. There was no fixed plan *per se*, but rather an evolving plan, the contours of which were shaped on an ongoing basis as the officers dealt with Schlette. Perhaps the

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[5]Under U.S.C. §§ 3655 and 4203(b)(4) (1988), probation officers function as parole officers.

officers should have decided to supervise Schlette more closely. Perhaps, as the Weissichs suggest, unannounced home visits might have been more appropriate. These are judgment calls, however. They are made by a probation officer in the context of balancing the policy considerations previously mentioned. As such, they are discretionary functions. The discretionary function exception of the FTCA applies, and the USPS is shielded from liability even if it was negligent in supervising Schlette while he was on federal probation.

The district court's dismissal of the Weissichs' action against the government is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROSEMARY WEISSICH, et al.,
Plaintiffs
v.
UNITED STATES OF AMERICA,
Defendant.

C-88-3583 RHS
ORDER

In this civil action, the sole remaining defendant is United States of America (hereinafter, "United States"). Presently under submission, after oral argument, are United States's alternative motions to dismiss and for summary judgment. Each motion is: (a) directed against the entire amended complaint; (b) based on the defenses of lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted; and (c) opposed by plaintiffs.

The action at bar arises out of the tragic November 1986 incident in which William Weissich, plaintiffs' husband and father, was fatally shot with a handgun while he was in his San Rafael law office. The murderer was Malcolm Schlette, who shortly after the murder committed suicide by ingesting poison. From 1955 to 1975 Schlette was incarcerated in the state prison as a result of an arson conviction obtained by Weissich, who was Marin County District Attorney from 1953 to 1960.

In January 1983 Schlette was arrested by United States's Bureau of Alcohol, Tobacco and Firearms. From May 1983 until his death, Schlette was on federal probation, in connection with his plea of guilty to being a felon in possession of firearms.

According to plaintiffs, Weissich's murder: (a) constituted revenge by Schlette for Weissich's obtaining the arson conviction; (b) resulted from United States's negligent failure to warn Weissich of the danger posed to him by Schlette; (c) resulted from United States's negligent supervision of Schlette while he was on probation; and (d) involved United States's negligent violation of the United States Constitution.

The action at bar arises under, and plaintiffs seek damages pursuant to, the Federal Tort Claims Act (hereinafter, "FTCA"). But United States has no FTCA or non-FTCA damages liability based on violation of the United States Constitution. Instead, in the action at bar United States is not liable unless, under similar circumstances, there would be liability under the law of California, the State where United States's alleged wrongdoing occurred [see *Pereira v. USPS*, 942 F.2d 577, 579-580 (9th Cir. 1991); *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991); *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir. 1985); *cert. dismissed*, 473 U.S. 934 (1985)].

Furthermore, in the action at bar, United States also is not liable if the discretionary-function exception to FTCA applies here. This exception covers acts that: (a) involve an element of judgment or choice; and (b) are based on considerations of public policy; [see *Woodman v. United States*, 764 F.Supp. 1455, 1462-1463 (M.D. Fla. 1991)].

However, it is unclear if this exception actually applies to any of plaintiffs' causes of action. In the rest of the present order, this Court: (a) assumes that this exception does not so apply; and (b) deals with the issue of whether, under circumstances similar to those in the action at bar, there would be liability under California law.

In general, California law imposes no duty to control another's conduct or to warn those endangered by such

conduct. Exceptions exist where one: (a) voluntarily has assumed a protective duty toward, and has acted on behalf of, the person who later is harmed; (b) has helped, even if only innocently, to create the danger posed to the victim; (c) has a special relationship with the victim; or (d) has a special relationship with the perpetrator [see *Doggett v. United States*, 875 F.2d 684, 689, 694 (9th Cir. 1989); *Molsbergen v. United States*, *supra* at 1021-1025; *Weissich v. County of Marin*, 224 Cal.App.3d 1069, 1076-1077 (1990); *Zepeda v. City of Los Angeles*, 223 Cal.App.3d 232, 234-235 (1990)]. But exceptions (a)-(c) simply do not apply in the action at bar.

As for exception (d), the connection between United States and Schlette constituted a special relationship if the connection was similar to the doctor-patient relationship [see *Doggett v. United States, supra* at 693-694; *Molsbergen v. United States, supra* at 1022]. It is not clear if such similarity existed. But in the rest of the present order it will be assumed that, in the period between the January 1983 arrest and Schlette's death, there was a special relationship between United States and Schlette.

By 1976, though, Weissich already was aware that Schlette intended to take revenge against Weissich [see *Weissich v. County of Marin, supra* at 1073-1074, 1083]. Particular plans by Schlette for revenge against Weissich and others apparently prompted Schlette's January 1983 arrest. It does not appear that Weissich ever learned of these particular plans, but they were ended by the January 1983 arrest. And the firearms associated with these particular plans were taken away from Schlette after the January 1983 arrest.

United States had no duty to warn Weissich based on conduct—statements and acts—by Schlette before the January 1983 arrest. This absence of a duty is based on: (a) Weissich's aforementioned awareness of the danger

from Schlette; (b) the January 1983 arrest's termination of particular plans by Schlette for revenge; and (c) the lack of any special relationship between United States and Schlette before the January 1983 arrest.

Then, too, there is no evidence that, in the period between the January 1983 arrest and Weissich's murder, United States learned of any conduct by Schlette that: (a) actually occurred during this period; and (b) suggested a danger to Weissich specifically.

Plaintiffs contend that United States's failure to learn of such conduct resulted from negligent supervision of Schlette while he was on probation. In determining whether specific alleged negligence is actionable under FTCA, a United States district judge usually must inquire as to whether a private individual would be liable under the relevant State's law. However, private persons do not act as probation officers. Thus, in connection with alleged negligent supervision of Schlette while he was on probation, it must be determined whether California law would make a county probation department liable for negligent supervision of a probationer. Such liability would exist if the county probation department's breach of a mandatory duty found in a statute, a regulation, or some other enactment proximately caused injury to a third party. But such proximate cause would be absent if performance of the mandatory duty would not necessarily have prevented injury to the third party [see *Doggett v. United States, supra* at 689-693]. And adequate, non-negligent supervision of Schlette while he was on probation would not necessarily have prevented Weissich's murder.

In view of what has been said so far in the present order, United States is not liable under FTCA for: (a) any negligent supervision of Schlette while he was on probation; or (b) anything else that allegedly caused Weissich's murder.

This Court hereby: (a) denies the motion to dismiss; (b) bases this denial on United States's having filed an answer to the amended complaint [see F.R.Civ.P., Rule 12(b)]; (c) grants the summary judgment motion; and (d) dismisses the amended complaint and the action at bar.

Dated: 3 February 1992

Robert H. Schnacke
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

No. 93-1422

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether California law or the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' action for the failure of the Bureau of Alcohol, Tobacco and Firearms and the United States Probation Service to warn petitioners' decedent that his life might be at risk from a federal probationer he had prosecuted in state court more than 30 years earlier.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1422

ROSEMARY WEISSICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is reported at 4 F.3d 810. The opinion of the district court (Pet. App. A13-A17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993, and a petition for rehearing was denied on November 4, 1993 (Pet. App. A2). The petition for a writ of certiorari was filed on February 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1955, petitioners' decedent William O. Weissich, the District Attorney for Marin County, California, prosecuted Malcolm Schlette for arson. Schlette was convicted and sentenced to 20 years' imprisonment. At that time, Schlette threatened to retaliate by killing the district attorney, the judge, the jurors, the police officers, and all the witnesses involved in his conviction. Schlette was released on state parole in 1966, but he was returned to prison to serve the remainder of his term after authorities discovered that he planned to carry out his prior threats. In 1975, Schlette completed his full term and was released without supervision. Pet. App. A6.

In January, 1983, Schlette was arrested by the Bureau of Alcohol, Tobacco and Firearms (ATF), a federal agency. He pleaded guilty to being a felon in possession of firearms and was placed on federal probation for five years. Three years later, in November, 1986, he shot and killed William Weissich and then committed suicide by ingesting poison. Pet. App. A6, A13.

2. Petitioners sued Marin County, the State of California, and others in state court, contending that state law enforcement authorities had promised Weissich that they would warn him about continuing criminal conduct by Schlette, and that they had failed to exercise their duty to do so. They also sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674. The district court held the federal case in abeyance until the California Supreme Court denied review of the California Court of Appeal's affirmance of the dismissal of the state case. See *Weissich* v. *County of Marin*, 274 Cal. Rptr. 342 (Cal. Ct. App. 1990), review denied (Cal. Jan. 30, 1991).

3. In February, 1992, the district court entered summary judgment for the United States (Pet. App. A15). The court assumed *arguendo* that the discretionary function exception to the FTCA did not apply, and considered whether the United States could be liable to petitioners under state law (*id.* at A14). The court noted that California law imposes no duty to control the conduct of another or to warn those endangered by such conduct except, as arguably pertinent here, where there is a "special relationship," similar to the doctor-patient relationship, between the defendant and the perpetrator (*id.* at A15). The court assumed *arguendo* that there was such a special relationship between Schlette and the United States during the period between January, 1983, when Schlette was arrested on federal charges, and November, 1986, when Schlette killed petitioner's decedent. Nevertheless, the court found that the United States had no duty to warn Weissich about any danger posed by Schlette during this period because there was no evidence that, during that time, the United States learned of any actual conduct by Schlette that suggested a danger to Weissich (*id.* at A16).

The district court also rejected petitioners' claims based on negligent supervision by the Probation Service (Pet. App. A16). The court first noted that, under the FTCA, it was required to determine whether private parties would be liable under the relevant state law in like circumstances (*ibid.*). Since private parties do not act as probation officers, the court considered whether California law would make a county probation department liable for negligent supervision of a probationer.[1]

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[1] This accurately reflects the Ninth Circuit's rulings on this subject. See *Louie* v. *United States*, 776 F.2d 819, 825 (1985); *Gallea* v. *United States*, 779 F.2d 1403, 1407 (1986) (Kennedy, J., concur-

The court observed that such liability would exist only if the injury were proximately caused by a county probation officer's breach of a mandatory duty, and that proximate cause would be absent if performance of the mandatory duty would not necessarily have prevented injury to the third party (*ibid.*). The court concluded that any negligence in supervising Schlette did not proximately cause Weissich's murder, because even "adequate, non-negligent supervision of Schlette while he was on probation would not necessarily have prevented Weissich's murder" (*ibid.*). The court therefore granted summary judgment for the United States (*id.* at A17).

4. a. The court of appeals affirmed, but on other grounds. The court of appeals held that the district court lacked subject matter jurisdiction over the case because the decisions made by the ATF and the Probation Service fell within the ambit of the discretionary function exception to the FTCA. As to the actions of the ATF, the court first noted that the plaintiffs had identified "no federal statute, regulation or policy mandating that ATF officers warn potential victims" (Pet. App. A7). The decision whether to warn was therefore a matter of "discretionary choice" for the ATF (*ibid.*), and this choice implicated policy concerns:

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ring); *Doggett* v. *United States*, 875 F.2d 684, 689 (1989); *Aguilar* v. *United States*, 920 F.2d 1475, 1477, 1479 (1990). However, the FTCA expressly provides, in 28 U.S.C. 2674, that the United States shall be liable only to the same extent as "a private individual" would be under like circumstances. Because private individuals do not act as probation officers, this express statutory limitation arguably precludes all federal liability for negligent probation supervision, even if particular States have elected to make their probation agencies liable for negligent supervision.

> These concerns include how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

Id. at A7-A8.

The court held that the Probation Service was also protected by the discretionary function exception. Although probation guidelines (Pet. App. A8) provide that probation officers have a duty to warn "specific third parties of a particular prospect of harm, physical or financial, which the officer 'reasonably foresees' the probationer may pose to them" (emphasis omitted), the court held that the discretionary function exception nevertheless applied because these guidelines "require [officers] to make independent policy judgments" (*id.* at A10). The guidelines give probation officers discretion to give warnings based on the officer's judgment, in each specific case, whether it is reasonably foreseeable that a risk of harm to a specific third party exists (*ibid.*). These judgments implicate the dual obligations of probation officers to protect the public and to promote the rehabilitation of the probationer, and "[b]ecause these interests may conflict, officer discretion in balancing them is inherent" (*ibid.*).

b. For similar reasons, the court also rejected the claims based on alleged negligent supervision by the Probation Service.[2] "[W]hen and how a probationer will report [to the probation officer] implicates a discre-

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[2] Petitioners have abandoned their negligent supervision claim in this Court.

tionary choice by the probation officer" (Pet. App. A11). To balance the officer's dual obligations to protect the public and to promote rehabilitation of the probationer, "a probation officer must establish a supervisory plan which both promotes the rehabilitation of the probationer and causes the least possible harm to the public. This balancing of interests necessarily involves policy decisions on matters such as public safety, allocation of scarce resources, and the likelihood of rehabilitation" (*ibid.*). As the court observed:

> Perhaps the officers should have decided to supervise Schlette more closely. Perhaps, as the Weissichs suggest, unannounced home visits might have been more appropriate. These are judgment calls, however. They are made by a probation officer in the context of balancing the policy considerations previously mentioned. As such, they are discretionary functions.

Id. at A11-A12.

ARGUMENT

This case does not warrant further review, because the district court was plainly correct in holding that, under California law, the ATF and the Probation Service did not have a duty to warn Weissich about a possible danger to him from Schlette. Regardless of the application of the discretionary function exception, therefore, the United States would not be liable to petitioners under the FTCA. The court of appeals also applied the correct standards for determining the discretionary function issue, and its fact-specific holding that petitioners' claims are barred by the discretionary function exception does not conflict with any decision of this Court or any other court of appeals.

1. As the district court correctly held (Pet. App. A15-A16), petitioners would not state a claim against the United States under the FTCA even if the discretionary function exception did not apply. Under California law, the ATF and Probation Service were not under a duty to warn Weissich that Schlette posed a danger to his life.

Under California law, "[a]s a rule, one has no duty to come to the aid of another." *Williams* v. *State of California*, 664 P.2d 137, 139 (Cal. 1983). More particularly, one has "no duty to control the conduct of another * * * nor to warn those endangered by such conduct." *Tarasoff* v. *Regents of the University of California*, 551 P.2d 334, 343 (Cal. 1976) (citations omitted). A narrow exception to this rule exists when "there is some special relationship between [persons] which gives rise to a duty to act," *Zepeda* v. *City of Los Angeles*, 272 Cal. Rptr. 635, 636 (Cal. Ct. App. 1990), such as "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection." *Tarasoff*, 551 P.2d at 343 (quoting Restatement (Second) of Torts § 315 (1965)).

The district court held that there was no "special relationship" between Weissich and the ATF or the Probation Service that gave Weissich a "right of protection," and petitioners do not argue otherwise.[3]

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[3] Petitioners do not contend, for example, that the ATF and the Probation Service promised Weissich that they would warn him about any threats against his life made by Schlette. This case thus stands in contrast to petitioners' state-court case, where they claimed that state law enforcement authorities had made such a promise to Weissich. The California Court of Appeal held in that case that the state agencies had no duty to warn Weissich because, among other reasons, "Weissich was well aware that Schlette had

However, the district court assumed *arguendo* that a "special relationship" existed between Schlette and the Probation Service after Schlette was placed on probation, because the Probation Service might have had the right to control Schlette's conduct. Pet. App. A15. Even so, the district court held that the Probation Service had no duty to warn Weissich because there was no evidence that the Probation Service knew of any threats made by Schlette against Weissich after Schlette was placed on probation. As the district court stated, "there is no evidence that, in the period between the January 1983 arrest and Weissich's murder, [the] United States learned of any conduct by Schlette that: (a) actually occurred during this period; and (b) suggested a danger to Weissich specifically." *Id.* at A16.[4] The absence of such evidence is fatal to petitioners' claim, because the California duty to warn that they invoke does not exist in the absence of a specific threat made against a specific victim. See *Thompson* v. *County of Alameda*, 614 P.2d 728, 735 (Cal. 1980).

2. Further review is also unwarranted because the court of appeals reviewed the discretionary function

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plans for revenge which persisted throughout his 20-year prison sentence; as a result, Schlette's potential for violence must necessarily have been of concern to Weissich even absent any knowledge of Schlette's subsequent criminal conduct." *Weissich* v. *County of Marin*, 274 Cal. Rptr. at 349.

[4] The district court did note that Schlette had made plans to murder Weissich before 1983, and that those plans resulted in Schlette's arrest and the confiscation of his firearms. Pet. App. A15. Between Schlette's release from prison on the completion of his sentence in 1975 and his arrest in 1983, however, Schlette was free of federal custody, and so the United States had no "special relationship" with him that would have given law enforcement agencies the right to control his conduct.

question under the correct legal standards, set forth by this Court in *United States* v. *Gaubert*, 499 U.S. 315 (1991), *Berkovitz* v. *United States*, 486 U.S. 531 (1988), and *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). Applying these standards, the court concluded that petitioners' claim based on a failure to warn was barred by the discretionary function exception. That conclusion does not conflict with any decision of this Court or any other court of appeals.

a. "[W]hether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz*, 486 U.S. at 536. "The exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536).

The court of appeals concluded that the ATF was shielded by the discretionary function exception under these principles. As the court noted, no federal statute, regulation or policy specifically required that warnings be issued in a case such as this (Pet. App. A7, A10). In fact, petitioners cited no policy at all regarding warnings by the ATF (*id.* at A7). Thus, the decision whether to warn Weissich was entirely a matter of "discretionary choice" for the ATF (*ibid.*).

As the court of appeals recognized, the ATF cannot possibly give warnings to everyone who might be at risk from a probationer. At the time of his state conviction, Schlette threatened to retaliate by killing the district

attorney, the judge, the jurors, the police officers, and all the witnesses involved in his conviction (Pet. App. A6). Even if the ATF had known that Schlette posed a threat to some of these people more than 30 years after his conviction (which was not the case, see *id.* at A16), the tasks involved in identifying them and tracking them down would have been immense. When these numbers are multiplied by the thousands of probationers, parolees, and suspects encountered daily by federal law enforcement agencies, it becomes clear that notification of everyone potentially at risk cannot be mandated. The decision whether to notify possible victims thus implicates "how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them" (Pet. App. A7-A8).

b. As to the Probation Service, the court of appeals correctly looked first to that Service's policy to determine whether it gave the Service discretion, and then considered whether that discretion was the kind that the discretionary function exception protects. The text of the Probation Service guidelines supports the court of appeals' decision on both issues.

First, as the court of appeals noted (Pet. App. A10), the guidelines do not require that probation officers review probationers' files at any particular time to determine whether probationers pose a threat to anyone. The guidelines provide that "the circumstances of probationers 'should' be reviewed periodically" to assess their danger to third persons (*ibid.*). The court of appeals interpreted this language to be "suggestive, not mandatory" (*ibid.*). Under this reading, the decision to review probationers' circumstances "involv[es] an element of judgment or choice." *Gaubert*, 499 U.S. at

322. That this judgment is exercised by individual probation officers does not make it any less "discretionary" for purposes of the discretionary function exemption. See *Varig Airlines*, 467 U.S. at 820.

The judgment at issue in this case also implicates policy considerations. As the court of appeals noted (Pet. App. A10), the Probation Service's guidelines specifically direct probation officers to consider the impact on the probationer's rehabilitation and the risk to the public when deciding whether to warn another of a possible threat. Even if the probation officer determines that a reasonably foreseeable risk to another person exists, that officer still must decide whether to give a warning, "based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation."[5] Pet. App. A9. These judgments are "decisions grounded in social, economic, and political policy." *Gaubert*, 499 U.S. at 323.

c. Nor does the decision below conflict with other appellate decisions holding that duty to warn claims are not covered by the discretionary function exception, as petitioners contend (Pet. 10-11). The Ninth Circuit did not hold that a tort action against the United States based on a duty to warn always implicates the discretionary function exception, as petitioners suggest (*id.* at 9), and such a ruling would have been contrary to prior case law of that circuit. See, *e.g.*, *Summers* v. *United States*, 905 F.2d 1212 (9th Cir. 1990) (National Park Service's failure to warn of potential danger from stepping on hot coals on public beach did not fall within

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[5] Even if a reasonable risk to another person exists, the probation officer is nevertheless authorized to give no warning to that person but, for example, to increase supervision of the probationer (Pet. App. A9-A10).

discretionary function exception). The court of appeals held only that, in this case, the duty to warn alleged by the petitioners implicated policy considerations.

This case is distinguishable on its facts from the other two decisions on which petitioners rely (Pet. 10-11). In *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1989), the First Circuit held that the Navy's alleged failure to warn the daughter of a shipyard worker about the dangers of exposure to asbestos was not grounded in any policy decision or consideration. The First Circuit observed that "it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds." *Id.* at 800. By contrast, in this case, the Probation Service's guidelines on whether to warn a potential victim of danger from a probationer are explicitly based on policy considerations, including the possible threat to the probationer's rehabilitation. See Pet. App. A10.

In *Smith* v. *United States*, 546 F.2d 872 (1976), the Tenth Circuit held that Yellowstone National Park's failure to post warning signs about the danger of falling into a thermal pool was not part of the exercise of a discretionary function. The Tenth Circuit stressed in that case that the Park Service's decision not to post warning signs was not, and could not have been, based on a policy decision to leave certain parts of the park undeveloped. According to the court, "[t]he decision to develop only certain areas did not create the problem or the need to decide whether warning signs should be erected. Rather, the need to make the latter decisions

has existed ever since Yellowstone was open to the public." *Id.* at 877.[6]

The Ninth Circuit's analysis in this case of the discretionary function exception did not differ in any significant way from the First Circuit's analysis in *Dube* or the Tenth Circuit's approach in *Smith*. Further review of its fact-specific decision is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994

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[6] The court also pointed to evidence in the record indicating that the decision not to post warning signs was, in fact, unrelated to any policy about development in the park. 546 F.2d at 877 n.5.

Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

No. 93-1422

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

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ELISE MARIE WEISSICH HUDSON; and
WILLIAM O. WEISSICH, JR.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I.

THE WEISSICH'S CLAIM IS PROPER UNDER CALIFORNIA LAW.

The Government devotes a considerable portion of its brief to an argument that under state law the ATF and U.S. Probation Service had no duty to warn. The Ninth Circuit did not reach this issue because it viewed its holding on the discretionary function issue to be jurisdictional. *See* Petitioners' Appendix at A-6. The Government's position on the state law issue is incorrect.

The Government argues that its agents did not have a duty to warn because there was no evidence that they learned of any conduct by Schlette after his arrest which suggested a danger to Weissich. Brief for the United States in Opposition at 8. This assertion is not supported by the record. The evidence establishing that agents of the USPS and ATF had specific knowledge that Schlette posed a danger to Weissich after his arrest is set forth in the Petition for Writ of Certiorari at 3-5.

Assuming, *arguendo*, that the federal agents learned nothing after the arrest, there would still be a duty to warn. In the leading case of *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 551 P.2d 334 (1976) a psychiatrist learned that his patient intended to kill a third party. At the psychiatrist's request, campus police detained the patient but then released him. *Id.* 17 Cal.3d at 431. There is no indication in the *Tarasoff* opinion that the psychiatrist learned of any additional threats after the detention of the patient. The California Supreme Court found that the victim's parents could state a cause of action under California law based on the psychiatrist's duty to warn, despite the brief detention. *Id.* 17 Cal.3d at 450. Here federal officials learned of particular plans by Schlette for revenge against Weissich. These plans were the reason they arrested Schlette. *See* Petitioners' Appendix at A-15. It is conceded that Weissich did not learn of these particular plans. *Id.* Schlette was then briefly detained and released on probation. The record indicates that throughout his probation, officers of the ATF and the U.S. Probation Office understood that Schlette remained a danger to those he had previously threatened, including Weissich. ER 106, 155.

The *Tarasoff* court's holding that detention by campus police did not absolve the defendant of a duty to warn the victim is equally applicable here. Moreover, assuming hypothetically that the psychiatrist in *Tarasoff* learned that his

patient had been stalking the victim immediately prior to the commencement of therapy, the fact that the threatening behavior occurred prior to, rather than during, the period of the "special relationship" between defendant and perpetrator surely would not absolve the defendant of liability. The Government cites no authority holding that the distinction between knowing that a dangerous criminal wanted to kill someone yesterday and knowing he wants to kill him today is enough to eliminate a duty to warn.

To summarize, the United States is suggesting that this court deny certiorari on the basis of an issue that was never reached by the Ninth Circuit. This would be inappropriate. There is clearly a triable issue of fact on the duty issue under applicable principles of California law.

II.

THE NINTH CIRCUIT'S DECISION WAS NOT FACT-SPECIFIC.

The Government argues that the Ninth Circuit's decision is "fact-specific." *Id.* at 6, 13. Based on this assertion, the Government distinguishes the instant case from *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989) and *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976) in which other circuits held that the discretionary function exception does not immunize the Government from liability for failure to warn of foreseeable dangers.

In fact, however, the Ninth Circuit's decision is not fact specific, primarily because the Government has no facts. As the Ninth Circuit acknowledges, the Government did *not* introduce evidence that it made a policy decision not to warn Weissich. In addition, the Government introduced no evidence of the potential cost or difficulty of providing a warning. The Ninth Circuit's opinion holds that such evi-

dence is *irrelevant* because of its conclusion that, as a matter of law,

> this choice [not to warn Weissich] implicated policy concerns. These concerns include how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints, as well as time and personnel limitations. . . . It is not necessary for the government to prove a conscious decision based on a policy analysis. . . .

See Petitioners' Appendix at A-7, A-8.

The Weissichs argue in their Petition for Certiorari that the Ninth Circuit's decision effectively eliminates affirmative duties to warn from the FTCA because the "policy concerns" set forth by the Ninth Circuit potentially apply in any situation in which a duty to warn might arise. Significantly, the Opposition Brief nowhere suggests how the language quoted above may be read more narrowly.

The Government also argues that in *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990) the Ninth Circuit held that the discretionary function exception did not bar federal liability for failure to warn. The Government's argument ignores the bulk of the Ninth Circuit's jurisprudence in this field, which holds that the discretionary function exception does bar liability for failure to warn. *See e.g.*, *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985) and *In Re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir. 1987).

The rationale of *Summers* was that there was no evidence that the Government weighed competing policy considerations. *Id.* at 1215. This approach was rejected by the above-quoted portion of the Ninth Circuit's opinion in this case,

which holds that the Government did not have to prove it made a decision based on policy analysis.

Indeed, the very contrast between the Ninth Circuit's analysis in *Summers*, which *was* fact-specific, and the Ninth Circuit's broad holding here that a duty to warn is discretionary because it *may* involve expense and other considerations, illustrates that the Ninth Circuit's interpretation of the discretionary function has become much broader. Petitioners submit that this error is based on a misreading of *Berkovitz v. United States*, 461 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991). This court should grant the instant petition for certiorari in order to clarify the law in this area.

DATED: June 14, 1994

Respectfully submitted,

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